

## DEVINE v. GOODSTEIN

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Cite as 680 F.2d 243 (1982)

not seek to substitute our judgment for that of the agency. Rather, as is our responsibility, we reverse here to require the agency to act in accordance with the will of Congress and pursuant to reasoned decision-making.

jeopardy clause and equal protection principles.

Reversed and remanded.

## 1. Labor Relations ⇐476

In order to assure conformity of decisions of arbitrators with those of Merit Systems Protection Board involving adverse personnel actions, the Civil Service Reform Act provides for judicial review of arbitrator's award in same manner and under same conditions as if matter had been decided by Board. 5 U.S.C.A. § 7121(f).

## 2. Labor Relations ⇐477

In proceeding for review of arbitrator's decision reversing immigration inspector's suspension for refusing to write report about incident concerning British citizen on ground that both self-incrimination and double jeopardy clauses of Fifth Amendment protected inspector's actions and that equal protection principles extended same protection to citizens not charged with criminal violations, exercise of jurisdiction of Court of Appeals for District of Columbia Circuit, which was discretionary, was appropriate where arbitrator erred in interpreting law and arbitrator's decision would have substantial impact on civil service law. 5 U.S.C.A. § 7703(d); U.S.C.A.Const. Amend. 5.

## 3. Witnesses ⇐306

Public employees are entitled, like all other persons, to benefit of Constitution, including privilege against self-incrimination. U.S.C.A.Const.Amend. 5.

## 4. Criminal Law ⇐393(1)

## Witnesses ⇐309

Testimony elicited from employee at administrative hearing under threat of discharge cannot be used against him in criminal prosecution, and conversely, state cannot discharge employee who refuses to sign waiver of immunity from prosecution. U.S.C.A.Const.Amend. 5.

## 5. Witnesses ⇐309

An employee cannot be discharged for refusing to testify at administrative hearing when state threatens use of testimony



Donald J. DEVINE, Director, Office of  
Personnel Management, Petitioner,

v.

Barnett M. GOODSTEIN, Arbitrator,  
American Federation of Government  
Employees, National Immigration and  
Naturalization Service Council, and Nor-  
man Fisher, Respondents.

No. 81-1230.

United States Court of Appeals,  
District of Columbia Circuit.

Argued April 23, 1982.

Decided June 4, 1982.

The Director of Office of Personnel Management filed petition for review of arbitrator's decision reversing immigration inspector's suspension for refusing to write report concerning British citizen who complained of offensive and uncooperative behavior. The Court of Appeals held that: (1) inspector did not believe and could not have reasonably believed that written report requested of him could be used in criminal prosecution, and thus arbitrator erred in invoking self-incrimination clause to excuse inspector's refusal to write report, and (2) arbitrator erred in relying on double

in criminal proceedings. U.S.C.A.Const. Amend. 5.

#### 6. Witnesses ⇐ 297(7), 309

If employee is informed that his responses and their fruits cannot be employed against him in criminal case, the state may insist that employee answer questions directed specifically and narrowly at performance of his job or else suffer loss of employment. U.S.C.A.Const.Amend. 5.

#### 7. Witnesses ⇐ 293½

The privilege against self-incrimination can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory, but it only protects against any disclosures that witness reasonably believes could be used in criminal prosecution or could lead to other evidence that might be so used. U.S.C.A.Const.Amend. 5.

#### 8. Aliens ⇐ 42

Immigration inspector did not believe and could not have reasonably believed that written report requested of him from Immigration and Naturalization Service concerning British citizen who complained of offensive and uncooperative behavior, could be used in criminal prosecution, and thus arbitrator erred in reversing inspector's suspension for refusing to write requested report on ground that inspector was protected by self-incrimination clause of Fifth Amendment. U.S.C.A.Const.Amend. 5.

#### 9. Criminal Law ⇐ 42

If immigration inspector had reasonably feared criminal prosecution, government, in order to compel written report from inspector concerning British citizen who complained of offensive and uncooperative behavior, would have had to have guaranteed that inspector's answers could not be used against him in criminal case, and thus inspector would have been entitled to recorded guarantee of criminal use immunity, and even if no such guarantee were provided, full use immunity would have attached in later criminal proceedings as matter of law. U.S.C.A.Const.Amend. 5.

#### 10. Criminal Law ⇐ 163

The protections of double jeopardy clause apply to proceedings that are "essentially criminal," and not to administrative investigation by Immigration and Naturalization Service of British citizen's complaint about manner in which he was treated by immigration inspector, during which investigation inspector had been suspended for refusing to write report concerning incident, and in any event double jeopardy clause had little relevance when no prior proceeding of any kind had occurred and when no threat of criminal jeopardy existed. U.S.C.A.Const.Amend. 5.

#### 11. Constitutional Law ⇐ 238.5

Equal protection principles could not extend either self-incrimination clause or double jeopardy clause to mere disciplinary matters, such as immigration inspector's suspension for refusing to write report concerning British citizen, who complained of offensive and uncooperative behavior, since self-incrimination clause by its very terms deals with criminal matters, and while double jeopardy clause has long been extended to situations beyond those involving "jeopardy of life and limb," it has always been confined to essentially criminal proceedings. U.S.C.A.Const.Amend. 5.

#### Petition for Review of a Decision of an Arbitrator

Susan Sleater, Atty., Dept. of Justice, Washington, D. C., with whom Charles F. C. Ruff, U. S. Atty., Washington, D. C., at the time the brief was filed, and William Kanter, Atty., Dept. of Justice, Washington, D. C., were on the brief, for petitioner.

Mark D. Roth, Washington, D. C., with whom James R. Rosa, Washington, D. C., was on the brief, for respondent American Federation of Government Employees.

Christopher Sanger, Washington, D. C., entered an appearance for respondent Barnett M. Goodstein.

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Before WRIGHT and WALD, Circuit Judges, and BONSAI,\* Senior District Judge.

Opinion for the court PER CURIAM.

PER CURIAM:

The Director of the Office of Personnel Management (OPM) petitions this court for review of an award by Arbitrator Barnett Goodstein. The issue presented is whether the Fifth Amendment excuses a federal employee from giving a report of his official conduct to his supervisors. Because the arbitrator erred in his application of constitutional law, we reverse his award as to the charge of employee insubordination.

# I. BACKGROUND

On December 28, 1979 a British citizen attempted to enter the United States from Mexico at a border checkpoint in El Paso, Texas. Norman Fisher, an immigration inspector, detained the visitor, writing in his detention report that the British citizen "was not employed" and "claims he free lances."<sup>1</sup> Mr. Fisher "required the alien to post a MS/D bond as a requirement of permit."<sup>2</sup> The British citizen withdrew his request for admission and left the checkpoint. He then wrote a letter of complaint about the manner in which he was treated.<sup>3</sup>

\* Of the United States District Court for the Southern District of New York, sitting by designation pursuant to 28 U.S.C. § 294(d) (1976).

1. Opinion & Award of the Arbitrator (Op.) at 6, Joint Appendix (JA) 8.

2. *Id.*

3. A copy of the letter appears in the record at JA 59-60.

4. Exhibit (Exh.) A-X-4, JA 66.

5. Exh. A-X-5, JA 67 (emphasis in original).

6. Op. at 7, JA 9. The Service had previously disciplined an employee for conduct reflected in a written report. *Id.*

7. The Civil Service Reform Act of 1978 gives employees the right to union representation at any examination by an agency representative in connection with an investigation if the employee believes the examination may result in

In an effort to respond to the letter, the Immigration and Naturalization Service (Service) sent a copy of the complaint to Mr. Fisher and asked him to write a complete report about the incident.<sup>4</sup> Mr. Fisher responded that before making such a report he wanted to know "all my rights."<sup>5</sup> By this he meant that "he wanted something in writing from the Service to the effect that it would not use his written report against him as the basis of disciplinary action."<sup>6</sup> The Service answered that he knew his rights<sup>7</sup> and ordered him to write a complete report. After a subsequent exchange of memoranda and the employee's continued refusal to write a report, the Service instituted an adverse personnel action against Mr. Fisher charging him with insubordination. The Service eventually suspended him for 15 days.<sup>8</sup>

Mr. Fisher chose to appeal the suspension to an arbitrator rather than to the Merit Systems Protection Board under an option created by the Civil Service Reform Act of 1978.<sup>9</sup> The arbitrator reversed the suspension, holding that the Service could not order a report without first giving complete immunity because "under the Constitution of the United States, no citizen is required to testify against himself \* \* \*."<sup>10</sup> OPM intervened and sought reconsideration of the decision.<sup>11</sup> Upon reconsideration the arbitrator held that both the self-incrimina-

disciplinary action. 5 U.S.C. § 7114(a)(2)(B) (Supp.IV 1980). Employees receive an annual notice of this right. *Id.* § 7114(a)(3). See Exh. A X 8 and Exh. A X 9, JA 57-58.

8. Mr. Fisher was also charged with leaving his duty station contrary to instructions. His suspension was based on both infractions. In reversing the suspension the arbitrator found that health concerns warranted Mr. Fisher's actions and that the Service's instructions were invalid under the collective bargaining agreement. Op. at 11-14, JA 13-16. The arbitrator's resolution of this second charge is not at issue before the court. See brief for petitioner at 8.

9. 5 U.S.C. § 7121(e)(1) (Supp.IV 1980).

10. Op. at 8, JA 10-11.

11. See JA 113.

tion and the double jeopardy clauses of the Fifth Amendment protected Mr. Fisher's actions and also that equal protection principles extended the same protection to citizens not charged with criminal violations.<sup>12</sup>

[1,2] OPM then brought this petition for review. In order to "assure conformity between the decisions of arbitrators with those of the Merit Systems Protection Board"<sup>13</sup> involving adverse personnel actions, the Civil Service Reform Act provides for judicial review of an arbitrator's award "in the same manner and under the same conditions as if the matter had been decided by the Board."<sup>14</sup> See *Devine v. Goodstein*, 669 F.2d 736, 737 & n. 1 (D.C.Cir.1981). Exercise of our jurisdiction, which is discretionary,<sup>15</sup> is appropriate in this case.<sup>16</sup>

## II. APPLICATION OF CONSTITUTIONAL PRINCIPLES

### A. The Self-Incrimination Clause<sup>17</sup> and Employee Questioning

[3-6] "[P]ublic employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination." *Uniformed Sanitation Men Ass'n, Inc. v. Comm'r of Sanitation of City of New York*, 392 U.S. 280, 284-285, 88 S.Ct. 1917, 1919-20, 20 L.Ed.2d 1089 (1968). Thus testimony elicited from an employee at an administrative hearing under a threat of discharge cannot be used against him in a criminal prosecution. *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). Conversely, the state cannot discharge an employee who refuses to sign a waiver of immunity. *Gardner v. Broderick*, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d

1082 (1968). Nor can an employee be discharged for refusing to testify at an administrative hearing when the state threatens use of the testimony in criminal proceedings. *Uniformed Sanitation Men, supra*. At the same time, if an employee is informed that his responses and their fruits cannot be employed against him in a criminal case, the state may insist that the employee answer questions directed specifically and narrowly at the performance of his job or else suffer loss of employment. See *Lefkowitz v. Turley*, 414 U.S. 70, 84, 94 S.Ct. 316, 325, 38 L.Ed.2d 274 (1973); *Gardner v. Broderick, supra*, 392 U.S. at 284, 88 S.Ct. at 1919; *Kalkines v. United States*, 473 F.2d 1391, 1393 (Ct.Cl.1973); *Uniformed Sanitation Men Ass'n, Inc. v. Comm'r of Sanitation of City of New York*, 426 F.2d 619, 627 (2d Cir. 1970).

[7] The privilege against self-incrimination as elaborated above can be asserted "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory \* \* \*." *Kastigar v. United States*, 406 U.S. 441, 444, 92 S.Ct. 1653, 1656, 32 L.Ed.2d 212 (1972). However, it only protects against "any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Id.* at 445, 92 S.Ct. at 1656 (emphasis added). Otherwise, the privilege cannot be invoked.

[8,9] In this case there is no evidence that Mr. Fisher believed his written report would form the basis of a criminal prosecution. The employee testified at the arbitration proceeding only that he feared civil

sion will have a substantial impact on civil service law. See generally 5 U.S.C. § 7703(d) (Supp.IV 1980). We note that this is apparently the first case in which OPM has petitioned this court for review of an adverse personnel action decision of either the Board or an arbitrator. See brief for petitioner at 5.

17. "[N]or shall [any person] be compelled in any criminal case to be a witness against himself \* \* \*." U.S.Const.Amend. V.

12. Opinion & Award on Reconsideration (Op. II) at 2-3, JA 19-20.

13. S.Rep.No. 95-969, 95th Cong., 2d Sess. 111 (1978).

14. 5 U.S.C. § 7121(f) (Supp.IV 1980).

15. See *id.* § 7703(d).

16. We agree with the determination of the Director of OPM that the arbitrator erred in interpreting the law and that the arbitrator's deci-

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disciplinary action.<sup>18</sup> Nor would fear of criminal prosecution have been reasonable under the circumstances of this case. The arbitrator thought a written report "could" "conceivably" have been used to link the employee with "a possible crime—the violation of [the British citizen's] Civil Rights \* \* \*."<sup>19</sup> This speculation has little support. The relevant statute prohibits willful deprivation of any constitutional or statutory right of "any inhabitant of any State, Territory, or District \* \* \*."<sup>20</sup> The alien's complaint of offensive and uncooperative behavior<sup>21</sup> hardly appears to rise to the level of an illegal deprivation, nor does it appear that the British citizen was an inhabitant of any state.<sup>22</sup>

Respondent seeks to raise the specter of criminal prosecution by citing two other prosecutions against Service employees based on supposedly "analogous" alien complaints. Brief for respondent at 16. However, the facts alleged in those indictments differ starkly from the alien's complaint in this case. *United States v. Clark*, Criminal No. 81-20015-01 (W.D.Ark.), involves charges of systematic assault with dangerous weapons on Cuban refugees detained at Fort Chaffee. Similarly, *United States v. Hopkins*, Criminal No. EP-81-CR-189 (W.D.Tex.), concerns allegations of repeated assaults against an alien in detention.

Thus, under the facts of this case, the employee did not believe and could not have reasonably believed that his written report could be used in a criminal prosecution.<sup>23</sup> Instead, an obvious motive lay behind the Service's request for a report: the government wished to respond to the British citizen's complaint. The arbitrator therefore

clearly erred when he invoked the self-incrimination clause to excuse Mr. Fisher's refusal to write a report.

B. *The Arbitrator's Reliance on the Double Jeopardy Clause and Equal Protection Principles*

[10] The remaining constitutional underpinnings of the arbitrator's award need not detain us for long. The protections of the double jeopardy clause apply to proceedings that are "essentially criminal," *Breed v. Jones*, 421 U.S. 519, 528, 95 S.Ct. 1779, 1785, 44 L.Ed.2d 346 (1975) (quoting *Helvering v. Mitchell*, 303 U.S. 391, 398, 58 S.Ct. 630, 632, 82 L.Ed. 917 (1938)), not to the type of administrative investigation involved in this case. In any event, the clause has little relevance when no prior proceeding of any kind has occurred and when no threat of criminal jeopardy exists.

[11] In addition, equal protection principles cannot extend either the self-incrimination clause or the double jeopardy clause to mere disciplinary matters. The self-incrimination clause by its very terms deals with criminal matters. While the double jeopardy clause has long been extended to situations beyond those involving "jeopardy of life and limb," it has always been confined to essentially criminal proceedings. The Constitution itself establishes limits to protections afforded by its provisions. The arbitrator's analysis clearly exceeded those limits.

### III. CONCLUSION

Therefore, the arbitrator's award regarding the insubordination charge is reversed

have guaranteed that his answers could not be used against him in a criminal case. See *Uniformed Sanitation Men Ass'n, Inc. v. Comm'r of Sanitation of City of New York*, 426 F.2d 619, 621 (2d Cir. 1970). Thus Mr. Fisher would have been entitled to a recorded guarantee of criminal use immunity. Even if no such guarantee were provided, full use immunity would have attached in later criminal proceedings as a matter of law. *Womer v. Hampton*, 496 F.2d 99, 108 (5th Cir. 1974). See *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967).

18. Op. at 7, JA 9.

19. Op. II at 3, JA 20.

20. 18 U.S.C. § 242 (1976).

21. See JA 60.

22. See *Screws v. United States*, 325 U.S. 91, 98, 65 S.Ct. 1031, 1033, 89 L.Ed. 1495 (1945).

23. If Mr. Fisher had reasonably feared criminal prosecution, the situation would have been substantially different. In order to compel a written report, the government would have to

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and the matter is remanded to the Immigration and Naturalization Service for imposition of an appropriate sanction.<sup>24</sup>

*So ordered.*



**Lawrence A. SCHMID, Appellant,**

**v.**

**Robert FROSCHE, Administrator, National Aeronautics and Space Administration (NASA).**

**No. 81-1884.**

United States Court of Appeals,  
District of Columbia Circuit.

Argued March 12, 1982.

Decided June 15, 1982.

Government employee brought action under Age Discrimination in Employment Act. The United States District Court for the District of Columbia, Spottswood W. Robinson, III, Chief Judge, 515 F.Supp. 1260, entered summary judgment in favor of the Government. Appeal was taken. The Court of Appeals held that substantial issues of material fact precluded summary judgment.

Reversed and remanded.

#### **Federal Civil Procedure** ¶ 2497

In age discrimination action by government employee, substantial issues of material fact existed as to government employee's claims of discriminatory treatment, discharge and retaliation on account of his age, precluding summary judgment. Fed. Rules Civ.Proc. Rule 56(e), 28 U.S.C.A.

<sup>24</sup> We note that the original suspension was based on two infractions, only one of which now has support.

Appeal from the United States District Court for the District of Columbia (D.C. Civil No. 80-00097).

Joseph B. Scott, Washington, D. C., with whom Irving Kator, and David H. Shapiro, Washington, D. C., were on the brief, for appellant.

John H. E. Bayly, Jr., Asst. U. S. Atty., Washington, D. C., with whom Charles F. C. Ruff, U. S. Atty., Washington, D. C., at the time the brief was filed, Royce C. Lamberth, Kenneth M. Raisler and Whitney M. Adams, Asst. U. S. Attys., Washington, D. C., were on the brief, for appellee.

Before MacKINNON and MIKVA, Circuit Judges, and WILSON COWEN \* Senior Judge, United States Court of Claims.

Opinion PER CURIAM.

PER CURIAM:

Appellant Schmid brought suit in the district court under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (the Act), alleging that his former employer, the National Aeronautics and Space Administration (NASA), had subjected him to discriminatory treatment, discharge and retaliation on account of his age. The district court on cross-motions for summary judgment granted NASA's motion, having concluded that there were no issues of material fact in dispute on any of the claims of refusal to place Schmid as a meteorologist, of improper reduction in force, or of retaliation. 515 F.Supp. 1260. We conclude that summary judgment was improvidently granted and therefore remand the case for further consideration of the disputed issues of fact set forth below.

#### **I.**

Dr. Schmid, who was 49 years old at the time of the disputed actions, worked as a GS-13 at the Goddard Space Flight Center (the Center) from 1958 until his separation

\* Sitting by designation pursuant to 28 U.S.C. § 293(a).